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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT BERNARD DELOUIZE, Defendant and Appellant.	A093574 (Mendocino County Super. Ct. No. CR 99-30477-02)

A jury found defendant Robert Bernard DeLouize guilty of three counts of lewd or lascivious acts with a child under the age of 14 years (Pen. Code, § 288, subd. (a)). On appeal he contends (1) the trial court lacked jurisdiction to reverse its order granting him a new trial, and (2) the version of CALJIC No. 2.50.01 read to the jury permitted a conviction without proof of guilt beyond a reasonable doubt.

We conclude the trial court had the discretion to reconsider its order granting a new trial and that the jury was properly instructed. We affirm the judgment.

BACKGROUND

Defendant was a karate instructor in Fort Bragg. His victim, Heather H., was 11 years old when she began taking karate instruction from defendant.

Heather testified regarding a series of escalating sexual advances by defendant. First defendant instructed her to hit him in the groin area during a karate move. This was unusual. Defendant showed other students a similar move, but only Heather was told to make contact. Next defendant told her that her breasts and vagina belonged to him.

Then, under the guise of helping her to meditate, defendant began to touch Heather's breasts and genitals. Finally, he took her hand and rubbed his penis with it through his clothing.

Heather eventually told her mother that defendant was molesting her, and her mother's fiancé called the police. The police had Heather telephone defendant. During the call, Heather asked defendant what rubbing her breasts and "privates" had to do with meditation, and he replied, " I don't know; it's just strengthening the mind."

The People introduced evidence of another incident involving a girl in Ione, California in 1992. Tiffany R. testified that she had taken karate lessons from defendant when she was 12 years old. On one occasion, when she was sitting in a car with defendant, he grabbed her, laid her across his lap, rubbed her chest, and touched her breasts. He told her "it was all meditation."

DISCUSSION

A. Jurisdiction to Reconsider a New Trial Order

Based on a Court of Appeal decision issued after the jury returned its verdict, defendant moved for a new trial on the ground that the jury was erroneously instructed on the burden of proof. The trial court granted the motion. When the decision defendant cited was later ordered not to be published by the Supreme Court, the People moved to reinstate the jury verdict. The trial court granted the People's motion, reinstated the jury verdict, and reversed its order granting a new trial.

Defendant contends the trial court lacked jurisdiction to reverse its order granting a new trial.

There is authority that supports defendant's contention. (See e.g., *People v. Taylor* (1993) 19 Cal.App.4th 836, 842; *People v. Snyder* (1990) 218 Cal.App.3d 480, 489-491; *People v. Hernandez* (1988) 199 Cal.App.3d 768, 771-773; *People v. Lindsey*

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[*] Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part B.

(1969) 275 Cal.App.2d 340, 343-344.) The rule applied in these cases, as stated in *People v. Taylor, supra,* 19 Cal.App.4th at p. 840, is that once a court has granted or denied a new trial motion, it has no authority to entertain a second motion or to change its former order. The only remedy for the aggrieved party is an appeal. (*People v. Lindsey, supra,* 275 Cal.App.2d at p. 343.) Citing dictum in one Supreme Court opinion (*In re Levi* (1952) 39 Cal.2d 41, 45, fn. *) and language in an even earlier Supreme Court decision (*People v. Martin* (1926) 199 Cal. 240), the court in *People v. Hernandez* pronounced the rule "long established." (199 Cal.App.3d at p. 773.)

Over the years several exceptions have developed to this rule. (See *People v. Snyder, supra,* 218 Cal.App.3d at p. 489, fn. 5.) The latest exception was created in *People v. Stewart* (1988) 202 Cal.App.3d 759, 762-763, but not before the court questioned the proposition that the trial court was without authority or had no jurisdiction to hear a second new trial motion. Though the *Stewart* court settled on merely creating a new exception to the rule (for a second new trial motion brought on the ground of ineffective representation in connection with the first motion), its decision opened the door for further reconsideration of the rule.

Thus, building on *Stewart, supra,* 202 Cal.App.3d 759, a panel from the Second District examined the underpinnings of the rule and found no jurisdictional bar to reconsideration of an order granting a new trial. (*People v. Rose* (1996) 46 Cal.App.4th 257, 261-264.) First, the court noted there was no statutory basis for the rule. (*Id.* at p. 262.) Second, the Supreme Court authority relied upon in earlier decisions did not support the conclusion that the rule was jurisdictional. (*Ibid.*; *People v. Stewart, supra,* 202 Cal.App.3d at pp. 762-763.)[1] Third, "the policy of judicial economy would be thwarted by not allowing the trial court to proceed in correcting an error of law." (*Rose, supra*, at pp. 263-264.) Thus, concluded the *Rose* court, prior to entry of judgment a trial court may reconsider its granting of a new trial motion in order to correct an error of law.

(*Id.* at p. 263; see also *People v. Castello* (1998) 65 Cal.App.4th 1242, 1246 [in criminal proceedings there are few limits on a court's power to reconsider interim rulings].)

Here, the People asked the trial court to correct an error of law prior to entry of judgment. Defendant suggests the People's request was untimely, but the record shows the People moved to reinstate the jury verdict 30 days after the Court of Appeal opinion was decertified. Defendant has not cited any statute or rule that sets a time limit for requesting reconsideration of an order in a criminal proceeding. (See *People v. Castello, supra,* 65 Cal.App.4th at pp. 1249-1250 [Code of Civil Procedure section 1008 does not apply in criminal proceedings].) We conclude the trial court properly exercised its discretion to reconsider its order granting a new trial.

B. CALJIC No. 2.50.01

The trial court instructed the jury regarding evidence of other sexual offenses with the following (pre-1999) version of CALJIC No. 2.50.01: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense [on one or more occasions] other than that charged in the case . . . . [¶] . . . If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit [the same or similar type] sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] was likely to commit and did commit the crime [or crimes] of which [he] is accused. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

Defendant contends this version of CALJIC No. 2.50.01 impermissibly allowed the jury to convict him without proof beyond a reasonable doubt of every fact necessary to constitute the charged crimes. He points out that CALJIC No. 2.50.01 has been revised so that it now specifically informs the jury that a finding the defendant committed

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[1] In *People v. Risenhoover* (1966) 240 Cal.App.2d 233, 235-236, the appellate court noted a change in statutory law eliminated the jurisdictional basis for the rule identified in *People v. Martin, supra,* 199 Cal. 240.

prior sexual offenses is not sufficient by itself to prove beyond a reasonable doubt that he or she committed the charged crimes. (See *People v. Hill* (2001) 86 Cal.App.4th 273, 275-276.)

This state's Courts of Appeal are split on whether the pre-1999 version of CALJIC No. 2.50.01 impermissibly altered the burden of proof. Some courts have found error in giving the instruction. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 34-37; *People v. Orellano* (2000) 79 Cal.App.4th 179, 184-186; *People v. Vichroy* (1999) 76 Cal.App.4th 92, 98-101.) Others have not. (*People v. Jeffries* (2000) 83 Cal.App.4th 15, 22-25; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1396-1398; *People v. O'Neal* (2000) 78 Cal.App.4th 1065, 1076-1079; *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1060-1063; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147-149.) As defendant concedes, this court's decision in *People v. Escobar* (2000) 82 Cal.App.4th 1085 is in line with the latter decisions. In *Escobar*, we found no error in reading to the jury the pre-1999 version of a virtually identical instruction, CALJIC No. 2.50.02 (evidence of other domestic violence). (*Id.* at pp. 1097-1101.) Defendant, nevertheless, requests that we reconsider our position in light of the specific facts of his case.

We have reviewed the published decisions discussing the propriety of the pre-1999 version CALJIC No. 2.50.01, in particular those issued after our decision in *Escobar*. We continue to believe that, when viewed in the context of the entire body of proper instructions delivered to the jury, there is no significant likelihood such an instruction would lead a jury to return a conviction based only on evidence of uncharged prior offenses, and in absence of proof beyond a reasonable doubt of the charged offenses. (See *People v. Escobar, supra,* 82 Cal.App.4th at p. 1101.) Here, the court instructed the jury on the elements of the charged offenses and the requirement that guilt be proven beyond a reasonable doubt. We find no error in the reading of CALJIC No. 2.50.01 in this case.

DISPOSITION

The judgment is affirmed.

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Sepulveda, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.

Trial Court:	Mendocino County Superior Court
Trial Judge:	Honorable Ronald Brown
Counsel for Appellant:	George Oliver Benton
Counsel for Respondent	First District Appellate Project Office of Attorney General Bill Lockyer, Attorney General Robert R. Anderson, Chief Assistant Attorney General Ronald A. Bass, Senior Assistant Attorney General Catherine A. Rivlin, Supervising Deputy Attorney General Matthew P. Boyle, Deputy Attorney General